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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CARL RAY BUSKE, Appellant.	)	2 CA-CR 2007-0171 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061513

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

R. Lamar Couser
Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Carl Buske was convicted of twenty-nine counts of sexual exploitation of a minor under fifteen. He was sentenced to mitigated, consecutive prison terms totaling 290 years. All of the convictions stem from Buske's possession of child pornography. On appeal, he argues (1) prosecutorial misconduct barred him from being retried after a mistrial, (2) vindictive prosecution should have resulted in dismissal of the charges against him, (3) evidence obtained pursuant to a search warrant should have been suppressed, and (4) the trial court erred in refusing to instruct the jury on third-party culpability. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). Based upon information provided by Buske's former roommate, police obtained a search warrant for Buske's residence and discovered in his bedroom numerous sexually explicit photographs of children. Several photographs had Buske's fingerprints, blood, or semen on them. A Pima County grand jury originally indicted Buske on nine counts of sexual exploitation of a minor under fifteen.

¶3 At trial, after the state presented evidence the trial court had previously ruled inadmissible, the court granted Buske's motion for a mistrial. The grand jury subsequently indicted Buske on the nine original counts and twenty additional counts of sexual exploitation of a minor under fifteen, and the trial court dismissed the original indictment.

The court then denied Buske's motions to dismiss the case for vindictive prosecution and on double jeopardy grounds. After being convicted of all counts, Buske filed this appeal.

Prosecutorial Misconduct

¶4 Buske argues that, based on the prosecutor's behavior before and during the first trial, the trial court erred when it authorized a retrial.[1] Although Buske provides an extensive factual and procedural history of the earlier case in his opening brief, he argues only that the first prosecutor committed misconduct by presenting evidence to the jury in violation of the court's pretrial order and by resisting Buske's discovery requests before trial.[2]

¶5 In the first proceeding, the trial court had ordered the redaction of certain statements from a recorded interview with Buske.[3] At trial, the prosecutor nonetheless

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[1]Buske's double jeopardy claim applies only to the nine charges he faced in his first trial, Pima County cause number CR-20044881, not the additional twenty counts with which he was charged after the mistrial, in CR-20061513. *See State v. Tucker*, 215 Ariz. 298, ¶ 43, 160 P.3d 177, 191 (2007) (federal and state prohibitions on double jeopardy "prevent[] a defendant from being tried twice for the same offense").

[2]Because Buske has not properly developed and supported an argument concerning the timeliness of the prosecutor's disclosure of a victim's identity, we do not address this issue on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (in opening brief, "[a]n argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *see also State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (argument not properly developed and supported by authority is waived on appeal).

[3]The record on appeal does not contain all transcripts from the first trial. We draw what facts we can from the transcript of the third day of his first trial, when the court heard arguments on Buske's motion for mistrial. In the absence of a complete record, however,

distributed to jurors an unredacted transcript of the interview and played an unredacted audio recording of the interview in court. Before the jury heard any inadmissible statements, however, the prosecutor alerted the trial court that the recording needed to be stopped and that the transcripts had not been redacted.

¶6 Buske moved for a mistrial the following day, arguing the transcript incident illustrated a pattern of prosecutorial misconduct that had begun before trial. The trial court accepted evidence from Buske and heard his arguments that the prosecutor and police department had been uncooperative, insulting, and harassing during the discovery process, at times threatening to bring additional charges if Buske sought disclosure of materials they deemed irrelevant to the case. Although Buske's attorney claimed the prosecutor's conduct took away her ability to present a defense, she acknowledged she had neither moved for an order compelling discovery nor informed the court of the perceived improper conduct prior to trial, and she could provide no explanation for having failed to do so.

¶7 The trial court found the prosecutor had not engaged in a pattern of misconduct and refused to grant a mistrial on that ground. The court did find, however, "that the prosecut[or] negligently failed to redact portions of the transcripts of the Defendant's statement, which included evidence previously precluded by the Court's pretrial

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we assume the missing portions support the trial court's ruling. *See State v. Scott*, 187 Ariz. 474, 476, 930 P.2d 551, 553 (App. 1996).

order." Based on the likelihood that jurors had read the transcripts, the court found Buske's right to a fair trial had been compromised and thus granted his motion for a mistrial.

¶8 Before his second trial began, Buske moved to dismiss all charges with prejudice, alleging prosecutorial misconduct and double jeopardy prevented his being retried. The judge presiding over Buske's second trial accepted the findings of the first judge and, in a carefully reasoned order, denied the motion. We review for an abuse of discretion a trial court's decision whether to dismiss an indictment on the ground of double jeopardy due to prosecutorial misconduct. *State v. Trani*, 200 Ariz. 383, ¶ 5, 26 P.3d 1154, 1155 (App. 2001). Following the declaration of a mistrial on a defendant's motion, double jeopardy principles bar retrial only if:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
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> 2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
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> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool v. Superior Court, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). We defer to the trial court's findings as to whether a prosecutor intentionally engaged in improper conduct. *State v. Korovkin*, 202 Ariz. 493, ¶ 8, 47 P.3d 1131, 1133 (App. 2002).

¶9 Here, the original judge found the prosecutor had acted negligently rather than recklessly or intentionally in failing to redact the interview transcript and cassette tape. Because the prosecutor herself brought the error to the trial court's attention, the record supports that finding. Therefore, jeopardy did not attach to bar a retrial necessitated by that error. *See Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72. Similarly, the alleged pretrial misconduct relating to Buske's discovery requests would not cause jeopardy to attach in this case because any prejudice it created could have been cured by means other than a mistrial, such as a timely pretrial motion for an order to compel compliance. *See id.* at 109, 677 P.2d at 272. Because Buske chose to proceed with the first trial without bringing any alleged disclosure violations to the court's attention until after that trial had commenced, Buske cannot now claim the court should have granted a mistrial on that basis.

¶10 The trial court did not abuse its discretion in finding the cause of Buske's mistrial to be negligence, rather than intentional or reckless misconduct. Double jeopardy principles, therefore, did not bar Buske's retrial on some of the same charges.

Vindictive Prosecution

¶11 Buske also claims the trial court erred in denying his motion to dismiss all charges due to vindictive prosecution.[4] Following the mistrial, the state obtained another indictment charging Buske with twenty additional counts of sexual exploitation of a minor under fifteen. Buske observes that the evidence underlying the newer counts had been in the state's possession all along, and he claims the state brought the additional charges in retaliation for his requests before the first trial to review all the evidence seized from him, as well as his successful motion for a mistrial.

¶12 We review a trial court's disposition of a claim of prosecutorial vindictiveness for an abuse of discretion. *State v. Brun*, 190 Ariz. 505, 506, 950 P.2d 164, 165 (App. 1997). A prosecutor's otherwise legitimate charging decision is vindictive if made in retaliation for the exercise of a constitutional or statutory right. *See id.*; *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992). "A defendant may demonstrate such prosecutorial vindictiveness by proving 'objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed

[4]In addition, he suggests his motion to dismiss was based on "malicious prosecution and shifting the burden." However, as the state correctly notes in its answering brief, malicious prosecution is a civil cause of action that may be maintained only by a prevailing criminal defendant. *See Cullison v. City of Peoria*, 120 Ariz. 165, 169, 584 P.2d 1156, 1160 (1978). And, because Buske has failed to develop his argument regarding the alleged burden-shifting as required by Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., we do not address this issue.

him to do.'" *Tsosie*, 171 Ariz. at 685, 832 P.2d at 702, *quoting United States v. Goodwin*, 457 U.S. 368, 384 (1982).

¶13 Given the difficulty of securing such proof, however, defendants are afforded a presumption of vindictiveness in circumstances where "a reasonable likelihood of vindictiveness exists." *Goodwin*, 457 U.S. at 373. As the Supreme Court has noted, "[O]nce a trial begins . . . it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted." *Id.* at 381. Hence, a more severe indictment issued after a mistrial raises a presumption of vindictive prosecution. *United States v. Motley*, 655 F.2d 186, 187-89 (9th Cir. 1981). To rebut this presumption, the state must present objective evidence justifying the additional charges. *See United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987).

¶14 To support Buske's claim of vindictive prosecution, defense counsel maintained that, when she and her two investigators, also women, had arrived at the police station for a scheduled appointment to inspect items found in Buske's apartment, a detective had accused them of having improper prurient motives in seeking to do so. According to counsel, the detective then read sexually explicit material loudly in their presence as they attempted to review the evidence. Finally, according to counsel, the detective threatened to bring 300 additional charges against Buske if they persisted in their task. Defense counsel also produced a transcript of a voice mail message in which the prosecutor had threatened

to file additional charges based on the contents of Buske's computer hard drive if counsel continued to seek disclosure of it.

¶15 But none of the new charges in the second indictment related to images on the hard drive. Rather, all of the charges were based on photographs found in Buske's apartment. After the mistrial, the prosecutor jointly reviewed boxes of evidence with defense counsel in order to satisfy Buske's disclosure requests. In this process, the state claims, it discovered photographs that had not been reviewed at the time of the original indictment. The state then filed additional charges based on the photographs found in the boxes. At the hearing on the motion to dismiss, the prosecutors assigned to conduct the second trial denied their colleague, who conducted the first trial, had any vindictive motivation in bringing the additional charges.

¶16 The trial court found the added charges were not the product of vindictive prosecution, and it denied Buske's motion to dismiss. In so ruling, the court analyzed Buske's vindictive prosecution argument in two parts. As to the state's behavior regarding pretrial discovery, the court did not find vindictiveness in light of the following facts:

> 1) The state never allowed the defense access to the computer hard drive; 2) The defense did not seek court intervention to compel disclosure; 3) The judge [in the first trial] ruled that the state had not violated any disclosure obligation under Rule 15; and 4) The state did not add any charges to the indictment [before the first trial but after the dispute about the hard drive] but proceeded to trial on the original indictment in October of 2005.

¶17 The trial court similarly found no retaliation against Buske to punish him for having successfully sought a mistrial in the first case. After applying the presumption of vindictiveness, the court found the state's post-mistrial charging decisions were proper, concluding that: for reasons of expedience, the state had reviewed only some of the seized materials before issuing the initial indictment; this practice was in conformity with the police department's custom in such cases of bringing approximately ten photographs to the prosecutor to charge; the photographs later discovered were similar in nature to those supporting the original charges; and the state brought the additional charges after it became aware of the additional evidence.

¶18 Preliminarily, we find the conduct of the detective and prosecutor as alleged by defense counsel troubling. No Arizona court should tolerate law enforcement behavior that creates a hostile environment for a defendant's exercise of his right to pursue the disclosure and inspection of potentially relevant evidence. *See* Ariz. R. Crim. P. 15.1(b)(5), (e)(1) (prosecutor must allow defendant, upon written request, to examine photographs and tangible objects seized from him); *State ex rel. Corbin v. Superior Court*, 103 Ariz. 465, 468, 445 P.2d 441, 444 (1968) ("Fundamental fairness" allows accused to discover items in state's possession necessary to proper preparation of defense). And we believe these incidents constituted circumstantial evidence that the prosecutor in question may have had a vindictive motive in eventually bringing additional charges against Buske. But we defer to the trial court's findings of fact, and we find sufficient evidence in the record to support

its ultimate conclusion that, notwithstanding the hostile atmosphere toward defense counsel's efforts at discovery and the arguably vindictive threats made by the prosecutor before the first trial, the prosecutor later added the additional counts solely because she had not been previously aware of the evidence supporting those charges. In short, the record thus supports the court's finding that the additional charges were a mere consequence of, but not retaliation for, Buske's discovery requests. Accordingly, the trial court did not abuse its discretion in denying the motion to dismiss.

Search Warrant

¶19 Buske further argues the trial court erred in denying his motion to suppress evidence seized as the result of a search warrant. Specifically, Buske claims the warrant was tainted by illegality because police came to know of the child pornography only after his apartment had been burglarized.[5] We will not disturb a trial court's ruling on a suppression motion absent an abuse of discretion. *State v. Carter*, 145 Ariz. 101, 110, 700 P.2d 488, 497 (1985). We consider on review only the evidence presented at the suppression hearing and, in so doing, view the facts "in the light most favorable to sustaining the trial court's ruling." *State v. Weekley*, 200 Ariz. 421, ¶ 3, 27 P.3d 325, 326 (App. 2001).

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[5]Although Buske attempts to incorporate his motion to suppress into the argument section of his opening brief "by reference[,] as if set forth in haec verba," this practice is prohibited by Rules 31.13(b)(2) and (c)(1)(vi), Ariz. R. Crim. P. *See also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (argument not within body of brief is procedurally defaulted). We therefore address only those grounds for suppression that Buske has properly argued in his opening brief and supported with citation to authority. *See Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d at 616.

¶20 Police obtained a search warrant for Buske's apartment from information provided by Michael Kenny, Buske's former roommate. Although Buske claims Kenny broke into his apartment unlawfully, Buske does not allege the police were involved in the burglary in any way. Indeed, Kenny told police he had sold some items taken from Buske's apartment and had retained other items "for blackmailing purposes." Finding that Kenny did not act in concert with police, the trial court denied Buske's motion to suppress in which he alleged information used in the application for the search warrant had been illegally obtained.

¶21 "The Fourth Amendment's proscription against unreasonable searches and seizures . . . 'is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *Weekley*, 200 Ariz. 421, ¶ 16, 27 P.3d at 328, *quoting United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The trial court did not abuse its discretion in finding that the burglary of Buske's apartment was not orchestrated by police. Accordingly, the court did not err in denying Buske's motion to suppress evidence obtained as a result of the search warrant.

Jury Instruction

¶22 Finally, Buske contends the trial court erred in refusing to give his requested instruction regarding third-party culpability. While the court permitted Buske to argue that the child pornography was not his and that he had been "set up," the court refused the

proposed instruction on the ground that (1) the separate instruction regarding possession adequately stated the law and (2) the proposed instruction would place undue emphasis on the defense.

¶23 We review a trial court's decision to refuse a jury instruction for an abuse of discretion, *State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006), and we will not grant relief for any error if it is harmless. *See State v. Johnson*, 205 Ariz. 413, ¶ 27, 72 P.3d 343, 351 (App. 2003). "Error is harmless if we can conclude beyond a reasonable doubt that it did not influence the verdict." *State v. McKeon*, 201 Ariz. 571, ¶ 9, 38 P.3d 1236, 1238 (App. 2002). A court may find harmless error when there is overwhelming evidence of a defendant's guilt. *See, e.g., State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004).

¶24 Here, as noted, Buske presented a defense that he did not knowingly possess the prohibited photographs. Specifically, he testified that he had known there was child pornography in his apartment and had been in the process of shredding it but had ceased that process because he had contracted the flu. But Buske's semen, blood, and fingerprints were found on several photographs that he was charged with possessing. And Buske admitted he was interested in children between ten and twelve years old "because they're blooming and they're budding." Thus, assuming *arguendo* that the trial court erred in refusing the proposed instruction regarding third-party culpability, any such error was harmless given the

overwhelming evidence that Buske knowingly exercised dominion and control over the photographs on which his convictions were based. *See id.*

Conclusion

¶25 For the foregoing reasons, we affirm Buske's convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge